Supreme Court of the United States.

THE WASHBURN & MOEN MANUFACTURING COMPANY,
PLAINTIFF, PLAINTIFF IN ERROR,

v.

THE RELIANCE MARINE INSURANCE COMPANY,
DEFENDANT, DEFENDANT IN ERROR.

DEFENDANTS' BRIEF ON PETITION FOR CERTIORARI.

This was an action removed from the Superior Court of Massachusetts to the United States Circuit Court for that district, and brought to recover the amount of a policy of insurance on a cargo of wire shipped on the schooner "Benjamin Hale" from Boston to Velasco, Texas. The policy contained the usual memorandum clause, to wit:

"MEMORANDUM. It is also agreed that bar, bundle, rod, hoop, and sheet iron, wire of all kinds, . . . are warranted by the assured free from average, unless general."

And also the following clause, stamped with a rubber stamp on the margin of the policy: "Free of particular average but liable for total loss of a part if amounting to five per cent."

The "Benjamin Hale" grounded on Bird Key, April 19, 1893, and in consequence the goods insured "though not wholly submerged" were injured to an amount exceeding fifty per cent of their value. The plaintiff made a seasonable and sufficient abandonment of the goods, which the defendant refused to accept. The "Benjamin Hale" was condemned and sold at Key West under a libel for salvage, and subsequently nearly all the goods were forwarded on the schooner "Cactus" to Velasco, where they were tendered to the plaintiff, who refused to receive them. At the time of tender, a very large part of the goods existed in specie, and a substantial part of them were practically uninjured. The goods were afterwards sold by order of court on the libel of the master of the "Cactus" for freight and charges. The plaintiff contended, —

I. That under the terms of the policy the defendant was liable for a constructive total loss of the goods insured, and

II. That the defendant and its agents so dealt with the goods after the damage was sustained that their action amounted to an acceptance of the plaintiff's abandonment.

The Circuit Court (Putnam J.) ruled: —

1. That under the terms of the policy the plaintiff could not recover for a constructive total loss, but only for an actual total loss of the goods insured, and that there was no actual loss, and

2. That there was no evidence of an acceptance by the defendant of the plaintiff's abandonment.

As there had been an absolute total loss of more than five per cent of the goods insured, a verdict for the value of the goods so lost was rendered for the plaintiff.

To the rulings above mentioned the plaintiff filed exceptions, which were heard by the Circuit Court of Appeals and overruled.

Washburn & Moen Mfg. Co. v. *Reliance Ins. Co.*, 82 F. R. 296.

The plaintiff now seeks, by writ of *certiorari*, to try the correctness of these two rulings before the Supreme Court of the United States.

I.

Was the defendant liable under the terms of the policy for a constructive total loss of the goods insured; that is to say, was it liable if, as in this case, a substantial portion of the goods reached the port of destination in specie and practically uninjured?

In an elaborate and considered opinion, put into the form of a charge to the jury, Putnam, J., held that the defendant was not liable. The charge contains a careful review of many of the authorities.

Record, page 137.

On appeal, the Circuit Court of Appeals recognized that the rule laid down by Judge Putnam rested upon an unbroken series of decisions made by the Supreme Court of the United States, and therefore somewhat briefly overruled the exceptions.

The plaintiff asks that a writ of *certiorari* may issue to review the correctness of these two concurring decisions, basing his request upon the ground that they are contrary to the decisions in England and in Massachusetts.

That the rule adopted in England differs from that adopted throughout the United States, we fully admit. The difference is recognized by all writers on marine insurance. For a fuller discussion of this point see page 15, *infra*.

That the rule regarding liability for a constructive total loss adopted in one or two cases in Massachusetts differs somewhat from that adopted in every other jurisdiction of the United States where the question has arisen, we admit. The difference is recognized in at least one text-book, and is fully discussed by Judge Putnam.

2 Parsons on Marine Insurance, 112, 117.
Record, page 139.

The Supreme Court of Massachusetts, however, has not passed upon the question presented by this case; but on the contrary has distinctly recognized that even in Massachusetts the question raised by this case is still open.

See Charge of Judge Putnam, Record, page 139, and page 14, *infra*, of this brief.

The rule adopted by the Circuit Court and by the Circuit Court of Appeals has been declared or recognized, —

By the Supreme Court of the United States, in a series of carefully considered decisions, beginning in 1814 and ending in 1873, since which last time no one has cared to question it;

By the Circuit Court of Massachusetts, speaking by Judge Story.

By the Supreme Court of Maine, speaking by Chief Justice Shepley.

By the Supreme Court of Louisiana, in two cases;

By the Court of Appeals, and other courts of New York, in a series of many cases, beginning in 1803 and ending in 1888.

By the Supreme Court of Pennsylvania in an early case never questioned since;

By the Supreme Court of Missouri.

Except in Massachusetts, the rule has never been questio judicially. The plaintiff asks the Supreme Court to overrule or regard all these cases in order to accommodate itself, not to decisions of the Supreme Court of Massachusetts (for that court expressly refused to decide the question raised in this case), bu what the plaintiff thinks, perhaps correctly, should be the log consequence of one or more of those decisions. If he should p vail, confusion would be introduced, and a well-established princ of marine insurance would be overthrown. It may reasonably hoped that the Supreme Court of Massachusetts, when the ques is again presented to it, will put itself into agreement with other courts of the United States. We submit that it is unreas able to ask the Federal courts and those of many states to put th selves into agreement with the dictum of the courts of one state.

We subjoin a detailed consideration of the terms of the policy, a review and discussion of the decided cases.

Under the terms of the policy, the defendant undertook no liabi for a constructive total loss of the goods insured, but only for actual total loss. In other words, the defendant was not liable substantial portion of the goods insured reached the port of desti tion in specie and practically uninjured. The defendant's liabi was limited by two clauses in the policy, —

First. The memorandum clause, of which the essential part re as follows: —

"MEMORANDUM. It is also agreed that . . . wire of all ki . . . are warranted by the assured free from average, unless genera and

Second. Upon the clause written on the margin of the poli "free of particular average, but liable for absolute total loss o part if amounting to five per cent."

Record, pages 109, 111.

The marginal clause and the memorandum are to be taken togeth they have the same meaning and are in no sense contradictory. B are qualified by the exception stated in the latter clause: "but li

for absolute total loss of a part if amounting to five per cent." Undoubtedly, a clause written in the margin of a policy controls the printed memorandum so far as the two differ; but on the point that is material in this case, the marginal clause does not differ from the memorandum but simply reinforces it. The words "free from particular average" in the margin are equivalent to "free from average unless general" in the memorandum, since average must be either general or particular; and the words are recited over again merely to indicate clearly that the words which follow, insuring against "absolute total loss of a part," are not intended otherwise to relax the provisions of the memorandum.

See *Chadsey* v. *Guion*, 97 N. Y. 333.
Brooke v. *Louisiana Insurance Co.*, 5 Mart. N. S. 530.
Insurance Co. v. *Fojarty*, 19 Wall. 640.

In the first-named case the letters "F. P. A." were not considered to take the goods insured out of the category of memorandum articles.

See also Judge's Charge, page 139.

So in this case the marginal note does not take the articles insured out of the category of memorandum articles, but merely qualifies the nature of the memorandum.

The exception to the provisions of the marginal clause does, however, plainly fix the meaning of that clause. "Free from particular average, but liable for an absolute total loss of a part if amounting to five per cent," plainly means *not liable except for an absolute total loss, but liable for absolute total loss of a part.* If there be any doubt, therefore, of the meaning of the words "free from average unless general," or "free from particular average," the qualifying exception to the clause written on the side of the policy establishes an *expressed* intention of the parties to make the underwriter liable only "for absolute total loss"—of a part, or the whole; but actual loss, not constructive, in either case. That the word "absolute" has the same legal meaning as *actual*, see

Monroe v. *British & Foreign Insurance Co.*, 52 F. R. 777.

The plaintiff seeks to draw a distinction between memorandum articles and articles not perishable in their nature, and hence he maintains that the wire injured in the case at bar was not a memorandum article.

Plaintiff's Brief, page 8.

We submit that there is but one definition of a memorandum article known to the law, viz., any article mentioned in the memorandum. If any article be named in the memorandum of a particular policy, it becomes, so far as that policy is concerned, a memorandum article. The memorandum itself distinguishes between different articles mentioned therein, and expressly applies to each article the rule which is adapted to its nature. There is no warrant in reason or in authority for applying a different rule to articles included with the consent of both parties under the same rule by the express language of the memorandum. In *Waln* v. *Thompson*, 9 S. & R. 115, 117, 119, an attempt was made to draw a distinction like that contended for by the plaintiff, but the Court disregarded the attempt.

It is the general rule of law that memorandum articles, or articles warranted free of particular average, free from average unless general, or however otherwise the meaning may be expressed, are insured only against an actual total loss. This rule is well established in the Supreme Court of the United States and in the courts of this Circuit.

In *Marcardier* v. *The Chesapeake Ins. Co.*, 8 Cranch, 39, a part of the goods insured were "memorandum articles," that is to say, they were warranted "free from average, unless general." (See contemporary form of memorandum in Marshall on Insurance, 1st Am. Ed., Boston, 1805, page 139 *et seq.* See also 8 Cranch, 42, 43.)

The plaintiff claimed damages for a constructive total loss of this part of the goods; but the Court refused to allow this. After stating the American rule applicable in the case of ordinary goods, viz., that a damage exceeding fifty per cent entitles the insured to recover for a total loss, Mr. Justice Story added: —

"But this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles. The legal effect of the

memorandum is to protect the underwriter from all partial losses; and if a loss by deterioration, exceeding a moiety in value, would authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles at an intermediate port, would entitle the insured to turn the case into a total loss, where the voyage is capable of being performed."

The learned counsel for the plaintiff is in error in the statement, made on page 12 of his brief, that the abandonment in this case was made too late. It is expressly stated that the abandonment was seasonable. See 8 Cranch, 41.

In the case of *Morean* v. *The United States Ins. Co.*, 1 Wheaton, 219, a part of the cargo consisted of "memorandum articles"; that is to say, goods warranted free from average, unless general. In delivering the opinion of the Court, Mr. Justice Washington said: —

"All considerations connected with the loss of the cargo, in respect to quantity or value, may, at once, be dismissed from the case. As to memorandum articles, the insurer agrees to pay for a total loss only, the insured taking upon himself all partial losses without exception.

"If the property arrive at the port of discharge, reduced in quantity or value, to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss. There is no instance where the insured can demand as for a total loss, that he might not have declined an abandonment, and demand a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss, and, consequently, he cannot elect to turn it into a total loss."

The learned counsel for the plaintiff, in his brief (page 12), says that these two decisions are at most mere dicta. We submit that they are, on the contrary, carefully reasoned decisions upon the question raised by the case at bar.

In the case of *Hugg* v. *The Augusta Insurance Co.*, Taney, 159, 7 How. 595, the insurance was upon freight on articles warranted free from average, and the Court throughout treated the case as governed by the principles applicable to similar insurance upon a

cargo. In delivering the opinion of the Court, Mr. Justice Nelson said, "In this country the rule has been uniform that there must be a destruction of the article in specie, as will be seen by reference to the following authorities" (quoting among other cases *Brooke* v. *Louisana Insurance Co.*, *Morean* v. *United States Insurance Co.*). "The rule as settled seems preferable, for its certainty and simplicity, and as affording the best security to the underwriters against the strong temptation that may frequently exist on the part of the master and shipper to convert a partial into a total loss." (7 How. 605, 606.)

The learned counsel for the plaintiff, in his brief (page 12), says that this case decided that there could be a recovery for a total loss of freight if the goods on the vessel were lost. What the case decided was this: that the defendant was not liable for a total loss of freight unless it appeared that there was a destruction in specie of the entire cargo.

See the Order of the Court, 7 How. 611.

In the case of *Insurance Co.* v. *Fogarty*, 19 Wall. 640, the insurance was on machinery warranted in the memorandum clause "free from average unless general," and further warranted by the insurers "free from particular average." The plaintiff sought to recover for a total loss. It does not appear explicitly that the insured made a formal abandonment, but, as appears from the record in the case, page 18, the declaration stated that two days after the loss, "he (the plaintiff) produced and made to the said defendants due proof of loss and of his interest," and this act, the equivalent of an abandonment, seems to have been assumed or admitted at the trial. The Court, after an elaborate discussion of *Marcadier* v. *Chesapeake Insurance Co.*, *Morean* v. *Insurance Co.*, and some other cases, laid down the rule that in the case of a warranty like that just quoted, the plaintiff could not recover if any part of the machinery reached its place of destination still existing as machinery. The plaintiff was allowed to recover on the ground that the stuff which reached the port of destination was not machinery but merely old iron. It appeared that the value of the stuff saved was less than the cost of saving it (see the Record in the case,

pages 33, 35, 42), but this fact was not treated as a cause for recovery.

The statement of this case made by the learned counsel for the plaintiff in his brief (page 13) is somewhat inaccurate. About one half the weight of the machine was saved, but less than one fortieth of its value (See 7 Wall. 641), and the value of the part saved was less than the cost of saving it. The court did not hold, as stated by the learned counsel for the plaintiff, "that the plaintiff could not recover for a total loss, as the goods were not in peril when the abandonment was made." The Court said nothing whatsoever about the abandonment (indeed the word does not occur in the opinion, except casually in a quotation), probably because, as has been shown, *supra*, an abandonment had been made within two days of the loss, and while all the goods insured were under water. What the Supreme Court did in *Insurance Co.* v. *Fogarty* was to hold that the plaintiff could recover if the machinery injured had ceased to exist as machinery, and that the charge of the judge to that effect in the court below was correct.

In the case of *Robinson* v. *The Commonwealth Ins. Co.*, 3 Sumner, 220, the policy contained a clause freeing the insurers from liability "for any partial loss on goods esteemed perishable in their own nature." The goods insured were held to be perishable, and so the case stood as if the goods had been declared specifically to be free from particular average.

In addressing the jury, Mr. Justice Story said: —

"The principle of law is very clear, that, as this is an insurance on a perishable cargo, the plaintiff is not entitled to recover unless there has been a total loss of the cargo by some peril insured against. If the schooner had arrived at the port of destination with the cargo on board physically in existence, the plaintiff would not have been entitled to recover, however great the damage might have been by a peril insured against, even if it had been ninety-nine per cent, or in truth even if the cargo had there been of no real value."

In the case of *Monroe* v. *The British & Foreign Marine Ins.*, 52 F. R. 777, the insurance was on cattle, and the policy contained the following clause: "against absolute total loss of vessels and animals only."

It was argued that under the policy the defendant was liable for a constructive total loss, but the Court held otherwise. See page 788.

The principles above stated have been supported and established by the opinions of the best writers on insurance, and by many cases in the courts of the several States.

Phillips on Insurance, ed. 1867, Sections 1615, 1767.
2 Parsons on Insurance, ed. 1868, page 111.

In the case of *Brooks* v. *Louisiana Insurance Co.*, 5 Mart. N. S. 530, 535, it was said by the Court "that nothing short of an absolute destruction of the whole property insured would render the assurers responsible, and if any portion reached the port of destination, they were discharged from liability."

In *Skinner* v. *Western Insurance Co.*, 19 La. 273, the Court approved the statement of Mr. Phillips, that "from most of the cases, it seems that although they (the goods insured) are so damaged as to be rendered absolutely of no value, still, if they remain in specie, if they so subsist that they may still be properly designated by the same name, the underwriters are not liable for a total loss." In this case, the doctrine was carried to its extremest limit. The article insured was raw pork, and the remnant of pork which arrived at the port of destination reached it as "roasted or barbacued" pork; yet the Court held that the pork still existed in specie, and that there could be no recovery.

In *Williams* v. *Kennebec Insurance Co.*, 31 Maine, 455, 463, the insurance was on cargo and freight, not liable for partial loss, and the Court said, "If (a perishable) article or any part of it arrives at the port of destination in specie, or can, with reasonable care and diligence, be carried there in that condition, although it may be worthless there, there can be no total loss." See also Judge's Charge, page 139.

Willard v. *Manufacturers Insurance Co.*, 24 Mo. 561, 566;
Waln v. *Thompson*, 9 S. & R. 115, 120;

in both which cases the rule laid down by the Supreme Court of the United States was fully recognized.

In the courts of New York it was early decided that the in-

surers were not liable for a constructive total loss of memorandum articles.

See

Maggrath v. *Church*, 1 Caines, 196, 211.

Neilson v. *Columbian Ins. Co.*, 3 Caines, 108.

Wadsworth v. *Pacific Ins. Co.*, 4 Wendell, 33, 39 (*free from average unless general*).

DePeyster v. *Sun Ins. Co.*, 19 N. Y. 272 (*free from average unless general*).

The case of *Wallerstein* v. *The Ins. Co.*, 44 N. Y. 204, has sometimes been treated as establishing the contrary doctrine, but an examination of the case will show that it does nothing of the sort. Defendant insured the plaintiff on coffee valued at about $25,000, and on wool valued at about $4,000, *free of particular average only*. Ship was sunk and abandoned by the insured. Under instructions from the insurers, salvors succeeded in saving about $1,000 worth of the wool, and less than $3 worth of the coffee. Suit was brought for a total loss. It was admitted both in the court below and in the court above that no recovery could be had for the insurance on the wool, although damaged to the amount of nearly seventy-five per cent (see *Burt* v. *Brewers Ins. Co.*, 9 Hun. 383, 388); but a recovery was had for the coffee as for a total loss, the Court holding, apparently, that it had totally perished, and that the recovery of an insignificant amount, both in quantity and value, was merely illusory, amounting to a fraud on the part of the insurers. It is true that the opinion of the Court casts some doubt upon the doctrine laid down in the case of *Morean* v. *The Ins. Co.*, above cited, but later decisions make it plain that the Court of Appeals in New York fully accepts the doctrine of the case last cited.

In *Burt* v. *The Brewers' Ins. Co.*, 9 Hun. 383, the insurance was "against actual total loss only." This phrase was assumed throughout to mean the same thing as the memorandum clause, and the Court said (page 386): "The meaning of (the memorandum) is that there can be no partial loss, and that there must be an actual destruction of the article specified in the memorandum, and not merely such a technical total loss as would authorize an abandonment." The Court further said (page 388): —

"It is supposed by the appellant that the case of *Wallerstein* v. *The Ins. Co.* has laid down a different rule as regards memorandum articles from that which we have hereinbefore relied on as a settled rule of law on the subject. We do not so interpret that case. There the insurance was upon wool and coffee free from average unless general."

"The coffee became wholly lost to the owner, that is, its entire value became lost, though the coffee remained in specie. But no recovery was allowed for the wool, though its value had been $3,961 and sold after the damage at $1,100.02 in excess of the auctioneer's charges, and this balance was subject to a deduction of sixty per cent for salvage, leaving only $440, or about one ninth of the value. It is true, it is said in that case, that absolute physical destruction is not necessary to constitute a total loss, but only a destruction of the thing insured, as the thing it was when insured. The coffee, though the berry still existed, was no longer coffee in the mercantile sense of the word, and could not be restored by any amount of expenditure." This case throughout treats the memorandum clause as equivalent to "against actual total loss only."

In the same case on appeal, 78 N. Y. 400, the Court of Appeals sustained the decision of the Supreme Court and said, "The well-considered opinion of Talcott, J., at the General Term, renders it needless to add more."

In *Chadsey* v. *Guion*, 97 N. Y. 333, there was the usual memorandum warranty that the goods were "free from average unless general." The letters "F. P. A." (free from particular average) also were written in, yet the Court throughout treated the goods insured as still memorandum articles, and it cited *Morean* v. *The U. S. Ins. Co.*, with approval, and assumed that *Wallerstein* v. *The Ins. Co.* agrees with it. It is true that in *Chadsey* v. *Guion*, the Court said that by the memorandum clause it was the intention of the parties to confine their liability to the absolute or constructive loss of the entire cargo. Whatever the word "constructive" may mean as used here, if, indeed, it be not a mere slip of the pen, plainly it does not refer to a fifty per cent loss; for in *Chadsey* v. *Guion* there was a loss of over ninety per cent, and yet the Court would not allow the plaintiff to recover. And in another part of the

opinion it is said: "An underwriter is not accountable for a partial loss on memorandum articles, except for general average, unless there is a total loss of the particular species"; and again, any dealing with the property "by the assured which results in the preservation of a substantial part of it (cargo insured), so that it may be delivered in safety and in good order at the port of destination, discharges the obligation of the assurers." 97 N. Y. 338.

In *Merchants S. S. Co.* v. *Mutual Ins. Co.*, 19 Jones & Spencer, 444, 455, the insurance was on a vessel "free of particular average," and the Court said:

"The rest of the policy, and particularly the written clause 'free from particular average,' fixes what claim may be made. That under this claim (*sic*, for clause) a constructive total loss cannot be claimed is generally declared to be the law. This is founded upon reason. The rule as to technical or constructive total loss was made from a necessity there was, many times, of determining whether, when some part of the thing insured remained after a loss, it could be correctly held that there was actual total loss. If what was left was inconsiderable as to any of the uses or advantages of the subject when whole, it would only be literally true that the loss was not total, while really the owner would be more likely to abandon the remnant than try to save it.

"How large or great a quantity might be left and yet there be a total loss was determined, not by attempting to ascertain the value of the remnant directly, but by ascertaining what the loss was; namely, the cost of repair, after the reduction of new for old, and if the cost were more than one half of the value of the thing insured, then it was deemed that the remaining half, represented by the actual remnant, was not so considerable that its existence should prevent a legal conclusion that there was actual total loss. It was not denied that in such case the insurers paid for what was only a partial loss, indemnifying themselves by taking the remnant. In many cases there was no doubt that there was no total loss actually. If the parties contract against such a method of judgment, the law will carry out their intent. The clause against particular average or partial loss means that the insurer will not pay what is in fact a partial loss, under any circumstances, and therefore not for a construc-

tive total loss, for the latter is really a payment for a partial loss, and for a constructive value of the remnants. There is no such thing as a constructive partial loss."

Finally, in the case of *Carr* v. *The Security Ins. Co.*, 109 N. Y. 504, 509, the goods were insured "against actual total loss only"; and the Court said that "the cases in this State, in respect to memorandum articles, where the insurer is liable only for an actual total loss, in the main, sustain the view that total loss in value of memorandum articles, so long as they remain in specie, is not an actual total loss of such articles within a policy of marine insurance."

It will be perceived that the last case goes much further than we need go in arguing the case at bar; and it brings the law of New York into full accord with that laid down by the Supreme Court of the United States in the case of *Morean* v. *The U. S. Ins. Co.*

In these cases the Court gave the same meaning to the various phrases "free of particular average," "free from average unless general," "liable only for actual total loss," etc.

The plaintiff relies upon certain cases decided in the Supreme Court of Massachusetts. In *Kettell* v. *Alliance Insurance Co.*, 10 Gray, 144, it was decided that under the following clause: "partial loss on sheet iron, iron wire, braziers' rods, iron hoops and tin plates, is excepted," the insurers were liable for a constructive total loss under the fifty per cent rule. In the opinion it was admitted that the insurers would not have been liable for a constructive total loss of memorandum articles, and the case was decided upon the ground, which was presented with some elaboration, that the goods insured differed in nature from memorandum articles. From the opinion it is perfectly clear that the Court which decided the case would have decided the case at bar in favor of the defendant, inasmuch as in the case at bar the articles insured were memorandum articles. See the discussion of this case in the opinion of Judge Putnam.

Record, page 139.

The case of *Mayo* v. *India Insurance Co.*, 152 Mass. 172, followed the case just quoted, and accepted it as an authority. In that case the Court expressly refused to decide whether under the ordi-

nary memorandum clause an insurer is liable for a constructive total loss. "Whether in this Commonwealth there can be no total loss of a memorandum article, if any part of it arrives at the port of discharge in specie . . . we express no opinion." 152 Mass. 175, 176. We believe that this is the only case in the courts of the United States in which it has even been intimated that the insurer may possibly be liable for a fifty per cent constructive total loss of memorandum articles. There are many cases holding precisely the contrary, while this case simply refuses to pass upon the point.

See the criticism on this case in

2 Parsons on Marine Insurance, 112, 117.

It is to be observed that the editor's note in Parsons was written by Mr. Lathrop, now justice of the Supreme Court of Massachusetts.

In order to decide the case at bar in favor of the plaintiff, the Circuit Court and the Circuit Court of Appeals must have disregarded decisions made in many cases, and the rule adopted in many jurisdictions of the United States. To decide the case at bar in favor of the defendant, those courts were not required to disregard a single decided case or a rule adopted in any jurisdiction. They needed only to refuse to draw from the last of the Massachusetts cases a corollary which the Massachusetts court in its own opinion expressly refused to draw.

See remarks of Judge Putnam, Record, page 139.

We need not refer at length to the English cases. No doubt, at the present time it is the law in England that for a constructive total loss of memorandum articles the plaintiff may recover, but it is also the law that the plaintiff cannot recover for a constructive total loss of any articles — memorandum or other — unless they are injured practically to the amount of one hundred per cent; that is to say, unless they are so injured as to be of no substantial value when brought to the port of destination. Thus the English rule is in effect nearly as rigorous as the American in respect of memorandum articles, while it is very much more rigorous in respect of articles not included in the memorandum. Further comment on the English cases is unnecessary.

See 2 Chitty Pl., 16th Am. ed., 163, note c.
2 Arnould on Insurance, 6th ed., 952, 1005, 1014.

In the case at bar a large part of the goods insured reached Velasco in specie, a substantial part of them being practically uninjured.

Deposition of Cragin, pages 28, 34.
Deposition of Cortes, page 71.
Deposition of Blum, page 105.

These depositions state the case most strongly for the plaintiff. Cragin was the plaintiff's agent, and Blum, though called by the defendant, proved a hostile witness. Yet the statements of both make it abundantly clear that in the case at bar the injury to the goods insured was less than that sustained in the case of *Morean* v. *U. S. Ins. Co.*, and in the other cases cited above, where the Supreme Court of the United States did not allow the plaintiff to recover. It is entirely clear that there was no "absolute total loss" of the property insured and that the Court could not have permitted the jury to pass upon the question. Defendant contends, therefore, that the Court was right in ruling that under the terms of the policy, and the circumstances of the case, the defendant was liable only for an absolute total loss of a part of the goods insured. (See Plaintiffs' Petition, page 9). For that loss the plaintiff has been already reimbursed.

II.

Was there evidence of the acceptance by the defendant of the abandonment made by the plaintiff?

This is a mixed question of law and fact, and a question of fact much more than of law. The judge of the Circuit Court had the advantage of hearing the testimony of some of the witnesses, and he carefully considered the depositions of the others. It was proved that the defendant expressly refused to accept the abandonment made by the plaintiff, and the learned judge could find no evidence strong enough to control this express refusal. The Circuit Court of Appeals

reconsidered the same testimony, and, while agreeing with the result reached by the Circuit Court, took a view of the testimony distinctly more favorable to the defendant than that taken by Judge Putnam. No important question of the law of insurance is involved in this branch of the case, and we submit that there is no good reason why the Supreme Court should reconsider a question of fact which has been carefully considered and unanimously decided by two competent tribunals.

For the purpose of reference, we subjoin an argument upon this branch of the case, taken, for the most part, from our brief addressed to the Circuit Court of Appeals.

Admitting, for the sake of argument, that the defendant was not originally liable for a constructive total loss, yet the plaintiff contends that such liability now exists by reason of the defendant's acceptance of the plaintiff's offered abandonment.

Was there, then, evidence of an acceptance by the defendant of the abandonment of the goods insured made to it by the plaintiff? It must be constantly borne in mind that the defendant refused to accept the plaintiff's abandonment in the most unqualified manner. The defendant's conduct must be considered in the light of its refusal. In spite of this refusal the plaintiff now contends that the defendant's acts subsequent to the refusal amounted to a retraction of it and the substitution for it of an acceptance.

The matter must be considered in two aspects. In his charge (see page 142), Judge Putnam said (1) that he thought the forwarding of the goods from Key West to Velasco was made by the defendant; but (2) he ruled that such forwarding, under the circumstances, was not evidence of an acceptance of the plaintiff's abandonment.

1. The Circuit Court of Appeals did "not entertain the view of the Circuit Court that the underwriters chartered the "Cactus" and forwarded by her the cargo from Key West to Velasco." "The sounder opinion" was by the Circuit Court of Appeals thought to be that those acts were done under the authority of the captain of the "Benjamin Hale". We submit that the Circuit Court of Appeals was right.

The facts were as follows: —

The charter party of the "Cactus" was made, not with the defendant, but with the master of the "Benjamin Hale," and was signed by him (Record, page 120). He authorized Messrs. Taylor & Curry, his agents at Key West, to charter the "Cactus," and they paid for the discharge of the cargo at Key West (Record, page 23). The bills for wharfage, etc., at Key West were made out to the owners and underwriters of the "Benjamin Hale," and not to the defendant or to the underwriters of the cargo (Record, page 122). The second bill of lading was signed by Mr. Taylor, of the firm of Taylor & Curry, agents for the "Benjamin Hale," and not for the defendants, as Capt. Hall testified. (See Record, page 23, 82 F. R. 296.) The goods are stated to be shipped by Capt. Hall, evidently with the intention of forwarding them to the plaintiff, to whom they were to be delivered (Record, page 125). The only evidence to connect the defendant with the forwarding is found in Capt. Hall's testimony, page 22, where he says that he received a request from the defendant's agent to forward the wire to Velasco. (His statement on page 23 that Mr. Moreno, the defendant's agent, did not wish him to take the cargo to Tortugas, but to go on to Key West, obviously has no connection with the forwarding to Velasco). Capt. Hanna, the defendant's agent, testified that he instructed Mr. Moreno, the underwriter's agent at Key West, to see that a vessel was secured and the cargo properly shipped to Velasco, according to the original bill of lading; that he always insisted on Capt. Hall's forwarding the cargo. (Record, page 86). Taking all this evidence together, it shows, not that the defendant forwarded the cargo to Velasco, but that the defendant was very careful not to do so, and that the forwarding, though perhaps made by its advice, and even at its instance, was the act of the master of the "Benjamin Hale."

That it was the duty as well as the right of the captain of the "Benjamin Hale" to forward the cargo seems clear.

2 Parsons on Insurance, page 155.

2 Phillips on Insurance, Sect. 1624.

Abbott on Shipping, 13th. ed., 411, 414.

Cannon v. *Meaburn*, 1 Bing. 243.

Shipton v. *Thornton*, 9 A. & E. 314.

Even if the transhipment were irregularly made or unauthorized, still it would not thereby become the act of the defendant. Let us suppose that A, a vendor, has shipped goods to B, a vendee, and that B, on examining the goods, promptly notifies A that they are not satisfactory. A controversy arises between A and B, and it is shown that B, while consistently and repeatedly denying ownership in the goods, yet has in good faith, and under a mistake of law, advised the common carrier to do acts which amount to a conversion of them. We have purposely stated the facts as strongly as possible against B, but we think it would be impossible to maintain that B's advice to the carrier, however urgent, operated as an acceptance by him of the goods.

We contend, therefore, that the Circuit Court of Appeals was right in holding that the forwarding to Velasco of the goods insured, though doubtless advised and urged by the defendant, was not its act, but the act of Capt. Hall. If this is true, the forwarding cannot, of course, be evidence of the acceptance by the defendant of the plaintiff's abandonment.

2. Supposing, however, as contended by the plaintiff, and according to the opinion of Judge Putnam, that the defendant itself did forward the goods to Velasco, was that act an acceptance of the plaintiff's abandonment?

We contend that both Judge Putnam and the Circuit Court of Appeals were right in holding that under the circumstances of the case, the forwarding of the goods, even if such forwarding be held to be the act of the defendant, was not an acceptance by the defendant of the plaintiff's abandonment.

In discussing this question it is necessary briefly to consider the occasion of an abandonment, when it is necessary, and when and how it must be accepted. According to the law of insurance, goods insured, even though they be not actually destroyed, yet may be so greatly injured that the insured becomes entitled to treat his loss as constructively total. In such case, the insured, however, is not compelled to claim for a total loss; he may, at his option, treat the loss as partial or as total, but if he seeks to recover the total value of the goods, he must abandon them to the insurer within a reasonable time, and not keep the insurer in doubt concerning his intention.

This abandonment must be timely; the insured must not speculate on the result of the peril insured against, nor can he wait to determine if a claim for a partial or for a total loss would be to his greater advantage. On the other hand, the insurer, in a case of doubt, is not permitted to speculate upon the event any more than the insured. He must not wait to determine if it will be to his greater advantage to accept the abandonment or refuse it. The obligation to abandon, and to accept or refuse an abandonment when made, is to some extent reciprocal. (See *Smith* v. *Robinson*, Dow, 474, 479; *Hudson* v. *Harrison*, 3 B. & B. 97.) Probably it is true, as stated by Mr. Justice Story in *Peele* v. *Merchants Insurance Co.*, 3 Mas. 27, 81, that the insurer is not bound to state explicitly whether he accepts the plaintiff's abandonment or not, and that mere silence is to be construed as a refusal; but, if the insurer remains silent and makes no reply to the abandonment made by the insured, his position thereby becomes so ambiguous that a court will often look to his acts to construe his unspoken intention, and will sometimes construe such acts as an acceptance of the abandonment. Thus, in *Hudson* v. *Harrison*, 3 B. & B. 97, where the insured, after abandonment, called a meeting of the underwriters and later notified them that the cargo was to be sold, to which notification the defendant paid no attention, while some of his fellow underwriters were approving the acts of the insured in dealing with the property, the Court said: "The question is, therefore, whether the underwriters by lying by in the present instance have not induced the assured to believe that the abondonment was acquiesced in."

So, also, in *Provincial Insurance Co.* v. *Leduc*, L. R. 6 P. C. 224, where the insured abandoned to the insurer the wreck of the vessel insured, to which abandonment the insurer made no reply but took possession of the wreck, raised it, and afterwards allowed it to be sold, the Court held that, under the circumstances, the insurer must be held to have accepted the abandoment.

The case of *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408, illustrates the principle just stated. The vessel insured was lost by a peril not insured against; but at the time of the abandonment, which was promptly made, this fact was unknown to

the insurer, and very possibly also to the insured. The insurer thereupon took possession of the vessel and repaired it, but, having thereafter discovered that the loss was caused by a peril not insured against, allowed it to be sold on a libel for repairs. The insured thereupon contended that these facts amounted to an acceptance of the abandonment, and requested the Court to charge the jury that the facts stated were evidence of the acceptance of the abandonment by the defendant. This the Court refused to do, though it seems that it left the question of the acceptance of the abondonment to the jury under some instructions not stated. The Supreme Court of the United States sustained the ruling of the Court below, and held that the facts stated were not evidence of an abandonment.

The same disaster was also considered by the Supreme Court of Michigan in *Northwestern Transportation Co.* v. *Insurance Co.*, 59 Mich. 214; *Richelieu Navigation Co.* v. *Insurance Co.*, 72 Mich. 571. In this case the additional fact was found that the insurer, having taken possession of the vessel, had never offered to return it to the insured. The Court, therefore, in the absence of any explicit statement by the insurer, held that the abandonment had been accepted, on the ground that such was the reasonable construction to put upon the insurer's act, and the judge delivering the opinion said, "I think the jury would have the right to construe the act most strongly against the defendant, for the reason that its interest was a matter entirely within its own knowledge, and by speaking it had the power to solve all doubts and dispel all ambiguities, and although no duty rested upon it to say whether it accepted the abandonment or not, so long as it was both silent and inactive, yet, when it did act, its duty was to say for what purpose, and with what intent it proposed to act." 59 Mich. 234.

See to the same effect,

Cinn. Insurance Co. v. *Bakewell*, 4 B. Mon. 541.
Singleton v. *The Phenix Insurance Co.*, 132 N. Y. 298.
Peele v. *Merchants' Insurance Co.*, 3 Mas. 27, 83.

These cases establish that where the insured makes seasonable abandonment to the insurer, who makes no reply thereto, but leaves the insured in doubt concerning his intentions, then the acts of the

insurer may in some cases be treated as an implicit acceptance of the abandonment.

This principle, however, has no application to the case at bar. Here the defendant declined to accept the abandonment as soon as the letter offering it was received (Record, pages 111, 115), and from that time forward persistently and unqualifiedly denied its liability and contested the claim of the insured for a total loss. There never was any ambiguity whatever in the attitude of the defendant.

See Judge's Charge, Record, 140, 141.

Acts of the insurer are construed as an acceptance of an abandonment, when a reasonable man would suppose that an acceptance was implied or intended by them. In the case at bar it would never have entered into the mind of a reasonable man, and it never did enter into the mind of the plaintiff, to suppose that the defendant had the slightest intention of accepting the plaintiff's abandonment. Suppose it had turned out to be for the plaintiff's interest to accept the goods when tendered to it at Velasco by the captain of the "Cactus"; it is clear that the defendant could not possibly have contested the plaintiff's right to them.

The case of *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408, 433, seems to treat it as an open question if an offered abandonment can be accepted when the assured has no right to abandon; or if such acts as taking possession of the property insured "after a perem ptory abandonment, *without qualification or reservation*, are such acts as imply and constitute an acceptance of the abandonment." However this may be, it can hardly be contended that even such acts can turn the most explicit refusal of an abandonment into its acceptance.

In the case at bar not only did the defendant immediately refuse to accept the abandonment when first offered, but it did so again as soon as the second offer of abandonment was made by the plaintiff at Velasco. It would be more reasonable to contend that the plaintiff's second abandonment at Velasco was a recognition of the invalidity of its first offer to abandon, than to contend that the defendant's repeated refusals to accept an abandonment were equivalent to an acceptance, and its insistence that the property in the goods still remained in the

plaintiff was the equivalent of an assertion that the goods belonged to the defendant.

See Record, pages 115, 127.

Shepherd v. *Henderson*, 7 App. Cas. 49, 62.

It must always be borne in mind that there is a principle of the law of insurance at least as important as that which concerns the acceptance of an abandonment — a principle which should receive its full application in this case. The interest of the community requires that both insured and insurer should labor with their utmost energy for the preservation of the goods insured. Under the old form of policy some courts tended to hold that a taking possession of or a dealing with the goods insured by the insurer after an abandonment amounted to an acceptance of the abandonment.

See *Peele* v. *Merchant's Insurance Co.*, 3 Mas. 27, 85.

In consequence of this tendency, property insured was sometimes allowed to perish because neither insured nor insurer dared to meddle with it; the one, for fear that he should be deemed to have revoked his abandonment; the other, for fear that he should be deemed to have accepted it. The "sue and labor" clause in some form was therefore inserted in the policy to enable both parties to labor for the preservation of the goods without affecting their rights, and this clause, whether regarded as a new stipulation or merely as a statement of the true principle of the common law of insurance, should in the interest of the community receive a generous application. The policy provides not only that the assured may sue, labor and travel for the safety of the goods, etc., but also contains an explicit stipulation that the acts of the insurer in recovering, saving and preserving the property shall not be considered an acceptance of an abandonment. The object of this stipulation, of course, is to provide that acts, otherwise unlawful, or which otherwise might be construed as an acceptance of an abandonment, shall, by virtue of the stipulation, become lawful and without prejudice to the rights of the insurer.

See

Judge's Charge, Record, page 140.

Munroe v. *The British and Foreign Insurance Co.*, 52 F. R. 777, 788.

In *Schuyler* v. *The Phœnix Insurance Co.*, 56 Hun. 493, the cargo was injured by perils insured against. The "sue and labor" clause in the policy was essentially the same as that in the case at bar. The insurer removed the cargo from the damaged vessel, delivered the uninjured part to the plaintiff, and sold the rest, paying the plaintiff the net proceeds. It was held as a conclusion of law that there was no such dealing with the cargo as to make it a total loss; yet in that case the evidence of abandonment was much stronger than in the case at bar, for the insurer did not merely deliver some of the goods at their destination, but also sold some of them without authority from the insured, in order to prevent further damage.

In *Thompson Steel Co.* v. *Boylston Insurance Co.*, 12 Mo. App. 244, the insurance was on iron shipped in a barge; the barge sank, the insured abandoned, and the insurer, after some delay, caused the goods insured to be raised and forwarded to their destination. It was held that the insured could not recover, and the Court said, "The mere act of abandonment confers no right on the assured, unless it be accepted by the insurer or be done under circumstances which render the right unquestionable." In that case, as in the case at bar, the plaintiff's abandonment was not justified by the facts; in that case, as held by Judge Putnam in the case at bar, the defendant procured the delivery of the goods insured at the port of destination, and yet in that case the plaintiff was not permitted to recover. We submit that *Thompson Steel Co.* v. *Boylston Insurance Co.* is a precise authority on the point presented here. Such cases as *Northwestern Transportation Co.* v. *Continental Insurance Co.*, 24 F. R. 171, *Norton* v. *Insurance Co.*, 16 Ill. 235, depend upon the principle that, if the insurer deals with the property insured, he must deal with it in a reasonable manner and not negligently or wantonly injure the insured.

We think we have shown that, even if it be assumed that the forwarding of the goods from Key West to Velasco was the act of the defendant, yet that this act, being reasonably done for the care and preservation of the property, cannot be taken as transforming an unqualified refusal to accept the abandonment into an unqualified acceptance of the same. However the plaintiff may now criticise the conduct of the defendant in forwarding the goods, there can be

little doubt that, if the injured goods had been uninsured, the plaintiff itself would have forwarded them in substantially the same manner. To have sold them at Key West would have been impossible, or at least improvident. It was not shown (Record, page 88), nor could it have been shown, that the acts of the defendant have caused the plaintiff any loss or deprived it of any profit. We believe that the defendant acted in the exercise of its rights as an insurer, but even if it erred in its construction of those rights yet its error does not make it liable for a total loss.

See Record, page 142.

It is asserted in plaintiff's brief (page 25), that "the purpose of the saving and forwarding of the cargo to the port of destination was not in order to save property, but to prevent the plaintiff from recovering his insurance."

This is not a fair statement of the facts. From the time that the "Benjamin Hale" went aground, the plaintiff made no attempt to save the goods, but bent all its energies to the pursuit of the insurance money. The motive of the defendant in helping to save the goods and in advising their forwarding from a place where they were worthless to the place where they were most valuable, was, doubtless, in part, to save its own pocket. The interest of the defendant was to save the goods; the plaintiff acted as if its interest was to leave them to perish and to depreciate their value. With the advice and help of the defendant they were brought to their destination worth a very considerable sum of money. If the plaintiff had not injured their market by refusing to receive them when tendered, their value would doubtless have been very much greater than the price brought by them at a forced sale. The sole object of the sue and labor clause in an insurance policy is to make it for the pecuniary interest of the parties to save the goods; to make the private interest of the insurer coincide with the general interest of the community in preventing a loss of valuable property; to give the insurer a pecuniary interest in the preservation of the goods insured. In doing what it did the insurance company in all good faith was protecting its own pocket and the interests of the public at the same time.

3. It is further argued by the plaintiff that there was such delay in forwarding the goods from Key West to Velasco as amounts to an acceptance of the abandonment. Admitting, in this place, for the sake of argument, that the forwarding was done by the defendant, and that for such delay as actually existed the defendant was responsible, yet we are unable to find any evidence of any unreasonable delay whatsoever; on the contrary, the evidence seems to show that the goods could not have been forwarded to Key West at any time before they were sent forward by the "Cactus." Had the goods been uninsured, and had the plaintiff itself used the utmost expedition reasonably possible, they would have reached Velasco no sooner.

Again, the plaintiff contends that the sale of the goods made at Velasco amounts to an acceptance of the abandonment. On this point it is sufficient to say that if, previous to the sale, there was a constructive total loss and a sufficient abandonment, then the defendant was liable before the sale, and his liability was not increased by it. If, on the other hand, the facts previous to the sale did not constitute an acceptance of the abandonment by the defendant, then the goods after their arrival at Velasco were at the plaintiff's risk, and, as the sale was made with the plaintiff's knowledge, and without its interference, the defendant cannot be made responsible for any loss which the plaintiff sustained thereby. The sale of the goods does not affect the case one way or the other.

The plaintiff also contends that the defendant is liable by reason of the difference between the terms of the charter of the "Cactus" and those of the charter of the "Benjamin Hale." Supposing, for the purposes of this argument, that the forwarding of the goods was actually done by the defendant, we cannot do better than adopt the language of the Judge's Charge (Record, page 144). This was one of the minor matters which "should have been raised at the time if it was to be insisted upon by the plaintiff." Such matters "cannot be taken advantage of here now, not having been insisted on at the time when they occurred." "If they had then been insisted on they could have been easily adjusted by the underwriters, and the difficulties removed." Hanna, the defendant's agent, instructed Moreno to see that the cargo was shipped according to the original bill of lading, and probably

Moreno so advised Hall; we suppose that the defendant never heard of the matters now complained of until the trial of the case. There is no evidence that the defendant or any of its agents ever saw the charter party of the "Cactus." We contend, as stated above, that the instructions of Hanna to Moreno did not contemplate a forwarding by the defendant, but only advice to the captain of the "Benjamin Hale" to forward. If, however, they be taken as contemplating an actual forwarding by the defendant, then they show that the defendant attempted to pay all charges, and would have paid those complained of, if requested by the plaintiff. In this connection, we would call attention to the letter written by the defendant's agent (Record, page 127), in which the defendant specifically asked the plaintiff upon what grounds the abandonment was based. It is clear that no ground was suggested except the general liability of the defendant for a constructive total loss of the goods insured. See telegram of plaintiff to Cragin, Record page 34. In *Dickey* v. *Insurance Co.*, 4 Cow. 222, 244, the Court said: —

"Undoubtedly the assured has a right to claim that his possession shall be absolute and perfect. He is not bound to relinquish his claim for a total loss, if, in reality, there is a lien or incumbrance attached to the vessel. But the abandonment was not put on this ground; it is stated to be in consequence of the disaster and the great injury to the voyage. In making the abandonment, the assured must assign the true causes. If he assign an insufficient cause, he is bound by it, and cannot avail himself of a new subsequent event without a new abandonment."

If, as we contend, and as the Circuit Court of Appeals stated, the "sounder opinion" is that the forwarding was not the act of the defendant, but that of the captain of the "Benjamin Hale," then, of course, the defendant was not responsible for its insufficiency.

III.

As to the plaintiff's suggestion that in deciding this case the Court is bound by the decisions of the Supreme Court of Massa-

chusetts, we cannot do better than adopt the statement of the Judge's Charge (Record, pages. 137, 138).

See *Gloucester Insurance Co.* v. *Younger*, 2 Curt. 322.

Upon the whole case, therefore, we submit that the writ of certiorari should be denied.

To hold that the defendant is liable for a constructive total loss of the goods insured, would be to reverse the rule of insurance law laid down in many cases, and unquestioned except in Massachusetts, where the rule applicable to the case at bar is not yet settled.

To hold that the defendant's acts done after his express refusal to accept the abandonment amounted to an acceptance of it, would be to disregard the view of the facts taken by both the Circuit Court and the Circuit Court of Appeals, which view is, furthermore, reasonable and well founded.

FREDERIC J. STIMSON,
of Counsel.